IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2417 OF 2004

IN

SUIT NO. 2463 OF 2004

Leela Valiram Malani ..Plaintiff

versus

Karan R. Vaswani & Ors. ..Defendants

Mr. Ravi Kadam, Mr. Snehal Shah i/b. M/s. Dhru & Co. for the Plaintiff.

Mr. N. G. Thakkar i/b. D. G. Rangras for the Defendants.

CORAM : D. G. DESHPANDE,J.

DATE : 15H DECEMBER,2004.

ORAL ORDER :

1. Heard learned counsel for the parties. This is plaintiff's notice of motion in a suit filed by her for declaration and injunction. The declaration that is sought by the plaintiff is that the agreement of development dated 22.3.2002 Exhibit 'B' and power of attorneys dated 10.1.2002 and 24.5.2002 Exhibits 'A' and 'C' stands validly terminated and for consequential reliefs.

2. It is the case of the plaintiff that she was the absolute owner of the suit property, hereinafter referred to as "Lila Villa" which comprised of ground plus three upper floors having 13 floors (as stated by her) in her plaint, two garages, and a servant's toilet etc. and that she was in possession of flat Nos.4A, 6, 9 and 13. Remaining flats were occupied by the tenants of the plaintiff.

3. Plaintiff had a son by name Suresh. He died in an accident on 23.2.2004. Defendant no. 7 is the widow of Suresh. Defendant Nos. 8, 9 and 10 are the children of Suresh.

4. According to the plaintiff sometime prior to January 2002 deceased Suresh represented to her that the suit property could be developed by utilising available FSI as held by loading TDR which could be purchased and therefore the plaintiff was persuaded by deceased Suresh to execute power of attorney in favour of defendant Nos. 1 and 2 to carry out construction on the suit property. This power of attorney dated 10.1.2002 is annexed at Exhibit 'A' to the plaint.

5. Thereafter the plaintiff due to persuasion of the deceased Suresh entered into a development agreement dated 22.3.2002 vide Exhibit 'B' and in

pursuance of this development agreement - Exhibit 'B', she executed power of attorney in favour of Suresh on 24.5.2002 - Exhibit 'C'.

6. According to her when the development agreement and power of attorney were executed by her in favour of her son Suresh, the power of attorney in favour of defendant Nos. 1 and 2 became redundant. Further it was not for any consideration. The deceased Suresh appointed defendant No.1, according to the plaintiff, as contractor under the power of attorney dated 24.5.2002 Exhibit 'C'. It is consistently the case of the plaintiff that the defendant Nos. 1 and 2 are contractors and not developers.

7. According to the plaintiff and as per the development agreement deceased Suresh was to pay her Rs.37 lacs is consideration but she received only Rs.5 lacs from Suresh at the time of execution of the development agreement. Deceased Suresh was reminded from time to time about the balance payment but he avoided doing so. Actually according to the plaintiff and as per the development agreement Exhibit 'B' deceased Suresh was bound to pay her Rs.9,77,000/= within 3 months of the sanction of the building plans and further a sum of Rs.25 lacs within six months from the date of payment of

Rs.9,77,000/=, but neither of these amounts were paid by deceased Suresh during his lifetime. Plaintiffs have further contended that prior to the death of Suresh defendant Nos.1 and 2 commenced additional construction. They were permitted to do so as they were appointed as contractors by deceased Suresh. But according to the plaintiff after the death of her son Suresh and since no payments were forthcoming she asked the defendants to stop the work of additional construction. But defendants denied their liability to pay anything to the plaintiff and she was told that further work was being carried out under the instructions of the defendant No. 7 and if at all there was any liability to pay it was of the defendant no.7, daughter in law of the plaintiff. In this background the plaintiff sent notice dated 10.4.2004 to the defendant nos. 1 and 2 calling upon them to stop the construction work and she also cancelled and revoked the power of attorney Exhibit 'A'. This was followed by correspondence not only to the defendants but to the Deputy Commissioner of M.C.G.M. and also Executive Engineer about cancellation of power of attorney. She also lodged complaint to the police on 6.5.2004. Since there was no response from the defendants, the plaintiff by her letter dated 10.5.2004 through advocate and addressed to defendant Nos. 7 to 10 terminated the

development agreement with immediate effect and also the power of attorney dated 24.5.2002 in favour of deceased Suresh. One month thereafter defendant Nos. 1 and 2 gave reply to her notice and they claimed that there was an agreement of sub development in respect of the suit property between deceased Suresh and defendant Nos.1 and 2 or the said Vaswani & Co. and a reference was made to a Will of deceased Suresh and alleged confirmation dated 7.5.2004 for development.

8. According to the plaintiff she was not at all aware of this sub development agreement nor of the Will. She also learnt that the defendant No. 11 was acting as executor of the Will and in that capacity entered into the sub development agreement.

9. In this background it is the case of the plaintiff that there was no contract for development between the plaintiff and the defendant no. 1 to 6; that she is the owner of the property, that the deceased had committed breaches of the agreement and therefore in that background the defendants had no right to carry on any construction work and they were entitled to be injuncted, for which the notice of motion is taken out by her.

10. This notice of motion was strongly opposed by

all the defendants. The main thrust of their argument is that the plaintiff could not in view of the specific words used in the documents Exhibits 'A', 'B' and 'C' treat or term defendant nos. 1 and 2 as contractors. The Defendant Nos. 1 and 2 were developers of the property. Secondly according to them the plaintiff cannot plead ignorance of the development activities because she was herself residing in the building which was to be developed. Thirdly she had signed the vital and important documents in favour of different Authorities. Next it was contended that under the power of attorney given to the son the right to sell the property i.e. development right and flats in the developed property was given to the son and therefore there could be no objection restraining transfer or alienation of the property by the defendants and regarding termination of agreement of development. It was contended that no time limit was fixed for payment and secondly the time was not the essence of the agreement for payment to the plaintiff and at any rate the plaintiff is only entitled to receive from the defendants the remaining amount of Rs.37 lacs. It was also contended that the draft for remaining amount was sent to the plaintiff and that was refused by her.

11. In view of this controversy, it is necessary to

go through the documents filed with the plaint and those by the defendants. Exhibit ’A’ is the power of attorney given by the plaintiff to the defendant Nos. 1 and 2. Exhibit ’A’ appears to be irrevocable power of attorney. In the very first paragraph the plaintiff has written that "I do hereby irrevocably nominate, constitute and appoint Defendant No.1 and 2 as her lawful attorneys." Paragraph 1 empowers the defendant Nos. 1 and 2 to do all acts, deeds and things for the development of the property either by demolishing the existing building or by constructing the additional floors on the existing building. Then the subsequent paragraph giving different rights and powers to the defendant Nos. 1 and 2 and in confirmation with this object, namely, development of the property. Further in paragraph 9, it is specifically stated that defendant Nos. 1 and 2 will have a right to enter upon the property and develop the property and to construct building thereon or construction of additional floors, then they have been empowered under clause 20 to purchase T.D.R. in her name from any DRC holder and to use the same on the suit property. The second document is development agreement Exhibit ’B’ executed between the plaintiff and the deceased son Suresh, who is referred to as a developer. She has appointed her son irrevocably as developer of the property with rights to use balance

surplus FSI, if any, and FSI available by way of TDR from open market and construct flat on the 3rd floor for consideration of Rs.64.77 lacs. She is admitted to have received Rs.5 lacs and at that time i.e. deceased Suresh was to pay her Rs.9,77,000/= within a period of 3 months from the date of obtaining sanction of building plans, then remaining Rs.25 lacs were to be paid within 6 months from the earlier payment and Rs.25 lacs were to be paid at the time of executing conveyance of the property in favour of any Co-operative Society etc. She has stated in clause 4 of the agreement, Exhibit 'B' that on execution of these presents the owner has handed over vacant possession of open compound and terrace on the third floor and terrace above the flat on the third floor (fourth floor) to the developer with authority to develop the property and construct flat /flats on the suit building at the cost of the developer. She has also in the same clause 4 clarified that agreement, arrangement, writing, contract or commitment which the developer may arrive at with the tenants / occupants of the ground floor shall ensure for the benefit of the developer alone and developer will be entitled to all the rights in respect of the area on the ground floor and will be at liberty to deal with or dispose of ground floor and parking space. Further similar rights have been given to the developer in respect

of the floor or floors to be constructed and in clause 9 she has agreed, confirmed that the developer shall be entitled to sell or give on lease or licence or transfer the premises which may be constructed by the developer or the premises which the developer may become entitled to in the suit property on ownership basis and receive consideration and appropriate the same without being liable to account for the same to the owner.

12. Third document Exhibit ’C’ is the power of attorney executed by the plaintiff in favour of her son Suresh. It is consistent with Exhibit ’B’ and all powers were given by her to her son for carrying out effectively the terms and conditions of Exhibit ’B’. What is transpired from these documents Exhibits ’A’, ’B’ and ’C’ is that plaintiff is knowing fully well the consequences of writings executed under three documents ’A’, ’B’ and ’C’. So far as Exhibit ’B’ is concerned, it appears that even at that stage the plaintiff has no interest left in the property excepting that of receiving the balance consideration from deceased Suresh. The right to pull down existing structure or construct new structure, to purchase TDR, to construct new building and to sell new building and appropriate the sale proceeds to himself that is by deceased Suresh, are indication of existence of a development

agreement between the plaintiff and deceased Suresh and her only interest now left is to receive consideration. Therefore there is strong force in the submissions made by the Counsel for the defendants that the plaintiff cannot be permtited to put obstacles in the development project.

13. Secondly about the knowledge of the plaintiff of the development work, counsel for the defendant Nos. 1 and 2 drew my attention to the further affidavit in reply dated 1.11.2004 of Karan Vaswani partner of defendant No.1. In this reply it is stated that as a constituted attorney of the plaintiff he applied to M.C.G.B. for utilization of TDR and development right certificate utilization form was duly submitted by him, it was signed on behalf of the plaintiff. This application for 810 sq. meters was thereafter approved and the TDR was utilised on the property, for which defendant Nos. 1 to 6 paid and the plaintiff is aware of this fact. He has stated that as required by the M.C.G.M. the plaintiff signed Indemnity Bond dated 6.1.2003 in favour of the M.C.G.M. indemnifying against damages etc. which may occur to persons on site during the course of construction of the building on the suit property and this indemnity has been duly notarised. It is dated 6.1.2003. Thereafter as per this affidavit the plaintiff gave undertaking dated

6.1.2002 to the Municipal Commissioner, as is required by the M.C.G.M. and this undertaking is duly registered with the Sub-Registrar of Assurances at Bandra. In this further affidavit copies of the aforesaid indemnity and the undertaking have been annexed. It is also stated in this further affidavit that the plaintiff by application dated 5.11.2003 applied to the M.C.G.M. for utilisation of TDR and that form was duly signed by the plaintiff and it is with this TDR of 200 sq. meters that the defendant Nos. 1 to 6 constructed additional 6th floor. Copy of this plaintiff's application is also filed vide Exhibit 4.

14. Strenuous efforts were made by the counsel for the plaintiff to meet these documents, however without success. From the aforesaid documents filed with the further affidavit, referred to above, and the wordings in Exhibits 'A', 'B' and 'C' it is proved by the plaintiffs that the agreement between the plaintiff and her son was for development, defendants are the developers and not contractors and development activity was being carried out by the defendants with full knowledge of the plaintiff and plaintiff was party to the said development activity as is clear from her signing on the indemnity bond, undertaking and letter for transfer of TDR, the documents annexed with the affidavit in

reply, referred to above. It is also clear from all these aforesaid documents Exhibits 'A', 'B' and 'C' and the documents of the rejoinder that the plaintiff's right in this property is now only to receive balance consideration from the defendants.

15. Coming to the aspect of termination of development agreement in plaint, the plaintiff has contended that she by her letter dated 10.5.2004 terminated the agreement and the power of attorney. The said letter is at Exhibit 'J' to the plaint. In this letter the plaintiff has in paragraph 7 stated that till the date the plaintiff did not receive the sum of Rs.9,77,000/= and Rs.25,00,000/= both aggregating to Rs.34,77,000/= though they have become long overdue. Then in paragraph 8 it is stated that plaintiff has indemnified defendant Nos. 1 and 2 to stop construction immediately but defendants neglected to comply with the requisitions. Thereafter in paragraph 10 the plaintiff stated that in view of the aforesaid breaches, among others committed by Suresh of the terms and conditions of the agreement, plaintiff terminates with immediate effect agreement for development dated 22.3.2002 and also the power of attorney which has come to an end on the date of the death. It is clear that the development agreement stands terminated for non payment of Rs.34,77,000/=

and for no other reasons, as rightly argued by the counsel for the defendants that in the development agreement time is not made the essence of the agreement.

16. Then one more aspect of the case and that is the development agreement was with Suresh with right to sell before and after the development and appropriate for himself the consideration, which he may receive. This development agreement is for receiving consideration for the amount specified in Exhibit 'B'. Suresh died in accident, he survived

now by the plaintiff as mother, defendant No. 7 as widow and defendant Nos. 8, 9 and 10 as children. Therefore all the heirs under the Hindu Succession Act Schedule I have equal right in the property, therefore right of the plaintiff in the property now is 1/5th only if there is no will. But Defendant Nos. 7 to 10 contends that there is will of Suresh and that if in the Will the plaintiff is excluded then that is the different subject matter and I need not go in that aspect of the matter particularly when probate granted in favour of the defendant Nos. 7 to 10 for whatever that may be has been revoked.

17. Therefore, in this background of the matter, even if the case of the plaintiff is accepted that

she has 1/5th share in the property or if she has in fact done away with all her rights for a valuable consideration mentioned in Exhibit 'B' then her right is to claim the balance of consideration from the legal heirs or whoever that may be.

18. The offer was pointed out to me by the counsel for the defendants that they had sent a demand draft to the plaintiff in the sum of Rs.37,00,000/= and they have shown their willingness to deposit that amount in court.

19. In these circumstances, I pass the following order:

ORDER

Notice of Motion is dismissed.

. Concerned Defendants are directed to deposit Rs.37,00,000/= (Rupees Thirty Seven Lacs) in the court within six weeks from today.

. Ad interim order stands vacated.

. Certified copy expedited.

(D. G. DESHPANDE, J.)

15.12.2004